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In the
Supreme Court of the United States

OCTOBER TERM, 1946

No. 1150

JOHN O. SCHUSTER, d.b.a. GENERAL MACHINE WORKS, and as THE A. & A. TOOL AND SUPPLY COMPANY,

Petitioner,

VERSUS

S. H. STURGEON, as Acting Collector of Internal Revenue in and for the State of Oklahoma; H. C. JONES, as Former Collector of Internal Revenue in and for the State of Oklahoma; and THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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MARCH, 1947.

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PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of John O. Schuster, d.b.a. General Machine Works, and as The A. & A. Tool and Supply Company, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

Petitioner herein filed an action in the District Court of the United States for the Western District of Oklahoma against the respondents herein for the recovery of alleged excessive income taxes paid and to enjoin the collection of additional taxes for the same years. The situation is fairly stated in the opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 61):

> "During the years 1937 to 1941, both inclusive, John O. Schuster was engaged in business in Oklahoma City, Oklahoma, operating part of the time under one trade name and part under another. He regularly filed annual income tax returns for those years; in 1943, he filed amended returns; and he paid the income taxes reflected by the returns. Thereafter, a deficiency assessment was made. Without admitting that any additional taxes were due, but claiming that all taxes had been paid in full, the taxpayer deposited with the Collector a sum much less in amount than the deficiency assessment to be used in the payment of any additional taxes that might be finally determined to be due. Claims for refunds were filed. About three months after the filing of the claims and without any formal action having been taken on such claims, the taxpayer filed this action against the Collector. It was alleged in the complaint that all taxes had been paid; that the deficiency was erroneous, arbitrary, and illegal; that the taxpayer was unable to pay the amount of the deficiency; that the Collector unless restrained

would levy upon the business of the taxpayer and dispose of it at forced sale for payment of the assessment; that the business had developed a valuable good will; that the attempted sale would destroy the business; and that the taxpayer would suffer irreparable injury for which he had no plain, speedy, and adequate remedy at law. The prayer was that the court issue a temporary restraining order, and a permanent injunction; and further that upon a hearing the court determine the excess in taxes paid and order the amount thereof refunded to him. Based upon the statements of fact made by the attorneys in open court, the court entered an order granting a temporary injunction restraining the Collector from attempting to collect the additional taxes embraced within the deficiency assessment and from interfering with the taxpayer in the operation and conduct of his business; and the court enjoined the taxpayer during the pendency of the action from selling or disposing of the business, or the assets and property of it, except in the usual and ordinary course of business. The appeal (to the Circuit Court of Appeals) was from that part of the injunction restraining the collection of the taxes."

B.

Basis of Jurisdiction of This Court

The Collector and the United States appealed from that part of the judgment and order of the District Court for the Western District of Oklahoma granting a temporary injunction, to the Circuit Court of Appeals for the Tenth Circuit, and that court rendered judgment reversing the District Court on January 8, 1947 (R. 64).

The opinion of the Circuit Court of Appeals (R. 61) is reported in ..... Fed. (2d) .....

Petition for rehearing was filed by petitioner (R. 67), and was denied by the Circuit Court of Appeals on February 8, 1947 (R. 73).

This petition for writ of *certiorari* is filed within the three months allowed by statute (Title 28, Section 350, U.S.C.A.) for filing petition for *certiorari* in this Court.

Jurisdiction is conferred upon this Court by Title 28, Section 347(a), U.S.C.A. (Jud. Code, Section 240, as amended), to require by *certiorari* that said cause be certified to this Court by the Circuit Court of Appeals for the Tenth Circuit for determination by this Court.

C.

Questions Presented

1. Whether the District Court has jurisdiction of a suit to enjoin the collection of Federal taxes, despite the provisions of Section 3653 of the Internal Revenue Code, which prohibits the maintenance of such a suit.

2. Whether unusual, exceptional and extraordinary circumstances justifying the interposition of equity to enjoin the collection of additional illegal and arbitrary Federal taxes are presented in a case wherein the taxpayer does not have funds sufficient to and is not able to pay such taxes without a liquidation of his business and such business has a value far in excess of the value of the physical properties thereof as a going concern with good will and a forced sale thereof would completely destroy the same.

D.

Reasons Relied On for the Allowance of the Writ

1. The decision of the Circuit Court of Appeals for the Tenth Circuit denying the right of petitioner to injunctive relief is in conflict with the decisions of this Court, particularly the decision in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 76 L. ed. 422, and other cases cited therein, holding that a suit may be maintained to enjoin collection where complainant shows that in addition to the illegality of the exaction there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence.

2. The decision of the Circuit Court of Appeals for the Tenth Circuit is likewise in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit, particularly the decisions in *John M. Hirst & Co.* v. *Gentsch*, 133 Fed.(2d) 247, holding that collection of invalid taxes may be enjoined in a case where such collection would ruin the business of the taxpayer, and in *Midwest Haulers* v. *Brady*, 128 Fed.(2d) 496, holding that where rights and property of an alleged taxpayer will be utterly destroyed if he is compelled to pay a tax that is not in fact his obligation, a court of equity will take jurisdiction to grant relief in advance of payment, notwithstanding Section 3653 of the Internal Revenue Code.

E.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 3386, S. H. Sturgeon, as Acting Collector of Internal Revenue in and for the State of Oklahoma; H. C. Jones, as Former Collector of Internal Revenue in and for the State of Oklahoma; and The United States of America, Appellants, *versus* John O. Schuster, d.b.a. General Machine Works, and as The A. & A. Tool and Supply Company, Appellee;" and that said judgment of the said United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JOHN O. SCHUSTER, d.b.a.
General Machine Works, and as
The A. & A. Tool and Supply Co.,
Petitioner;

HERBERT K. HYDE,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I.

OPINIONS

No opinion was rendered by the United States District Court, except that written Findings of Fact and Conclusions of Law (R. 34) were made and filed. The judg-

ment was by Stephen S. Chandler, Jr., United States District Judge (R. 37).

The opinion of the Circuit Court of Appeals for the Tenth Circuit (Bratton, Huxman and Murrah, Circuit Judges; written by Judge Bratton) was rendered January 8, 1947, and is found beginning at Page 61 of the Record, and is reported in ..... Fed. (2d) .....

II.

JURISDICTION

Jurisdiction of this Court to grant *certiorari* is invoked under Title 28, Section 347(a), U.S.C.A. (Jud. Code, Section 240, as amended), and is shown in the Petition at Page 4.

III.

STATEMENT OF CASE

A general statement of the facts in the case, as outlined by the Circuit Court of Appeals in its opinion, is set out in the Petition, at Page 2.

In addition thereto, attention is called to the following specific allegations of the Complaint, which was verified and which the trial court had a right to consider as evidence on the hearing of the application for temporary injunction:

> "4. Plaintiff further states that notwithstanding the aforesaid returns and the payment of taxes thereon, the deficiency assessments above mentioned were made

and entered, which said assessments were and are erroneous, illegal and void. That after such assessments were made, this plaintiff deposited with the defendant herein the sum of $15,000.00 to be used in the payment of any additional tax that might be finally determined to be due, without admitting and in fact averring that all of said income taxes due had been fully paid and satisfied. Plaintiff further states that thereafter a further examination and audit of this plaintiff's business was carried on by competent and qualified auditors and that it was found and determined by such auditors that the amount of income tax owed by this plaintiff for the period of time above mentioned amounted to the sum of $6,265.50, which, however, was in excess of the amount previously found due and paid by returns previously filed. * * That this plaintiff has paid and tendered to the Collector of Internal Revenue the sum of $21,456.47, leaving the sum of $17,532.51 in excess of any and all taxes, penalty or interest due the Government, or an overpayment of said income tax in the sum of $17,523.51. Notwithstanding these facts, the defendant, as Collector of Internal Revenue, has notified this plaintiff and has caused notices to be served upon him making demand upon him to pay an additional sum of $59,493.45. That the said defendant, as such Collector, has threatened to and will cause additional demands to be made upon this plaintiff and will execute tax warrants and distraint orders, and that he intends to and will take possession of all of this plaintiff's property, business and assets, and threatens to and will cause the same to be sold at public auction, or otherwise, to pay and satisfy the alleged balance of said tax so claimed to be due and owing.

"5. Plaintiff further states that said deficiency assessments so made and levied against this plaintiff and his property, except in the amount above mentioned, which has been fully paid and satisfied, were and are arbitrary, erroneous and illegal and, as a matter of law,

constitute an amount for which he is in no way liable and which said amounts are unjust, unreasonable and unlawful. Plaintiff further states that he has actually paid all of the tax due to the defendant * *.

"6. Plaintiff further states that he commenced his present business in June, 1933, with a small amount of cash and equipment and has, through the intervening years, built said business to a fair size for this community, and that during said time he has developed a good will and an intangible value in said business, the value of which he cannot accurately determine but alleges that his good will and the intangible assets of his said business is worth more and has a greater value than that of his physical properties and assets. That if the defendant is allowed and permitted to take possession of his said business and dispose of the same at forced sale, as he threatens to do, it will cause this plaintiff to suffer the entire loss of his business, which includes its good will and its intangible value, which has a value far in excess of that of the tangible assets, and that the result from such action will be to completely ruin and destroy this plaintiff's business and compel a complete cessation of its operation. That such action on the part of the defendant will cause this plaintiff great and irreparable damage and injury and in such an amount that he cannot recover the same by any means or process now provided by law. And plaintiff further states that all of his rights and all of his property will be utterly destroyed by the acts of the said defendant and that an attempt to have his business sold and then seek a recovery through suit or refund would in no wise adequately restore to him that which he would lose by reason of such procedure and that the laws don't provide an adequate means of relief to him in seeking to recover by refund, or otherwise. Plaintiff further states that he doesn't have the money and that he cannot raise the same by disposing of his property, or otherwise, to pay the said alleged tax which is erroneous, illegal and arbitrary, and that by reason thereof said defendant will, as aforesaid,

take possession of his business and assets and cause the same to be sold, to the great and irreparable damage to this plaintiff and his business."

In an amendment to the complaint (R. 6), plaintiff shows that he filed claims for refunds of the alleged overpayments, and that the same were rejected by the Commissioner of Internal Revenue. The affidavits attached to the several claims for refund (R. 9, 11, 14, 17, 20, and 23) show the basis for such claims, and the trial court had a right to consider these affidavits, also, as evidence upon the hearing on the application for temporary injunction.

Attention is also called to the following specific findings of fact made by the trial court, based upon the foregoing verified complaint and affidavits and the statements and admissions made in open court (R. 35):

"5. * * and the court finds that the plaintiff has paid and tendered to the Collector of Internal Revenue the total sum of $21,456.47, * * and the court finds from such allegations and such statements and admissions made in open court that such *probably* amounts to an *overpayment* and that plaintiff is *probably entitled to a refund* of at least a portion thereof.

"6. * * and the court finds, by reason of the threatened seizure and sale of plaintiff's property by the officers, agents and collectors of the defendants, and from the statements and admissions made in open court, that the said Commissioner of Internal Revenue by his actions has *rejected* said claims for refunds * *.

"7. That the plaintiff *does not have funds* sufficient to and is not able to pay the additional taxes and assessments claimed by the defendants to be due, *without a liquidation of his business;* that the defendants are threatening to and will, unless restrained therefrom

by this court, seize and take possession of plaintiff's said business and will sell and dispose of the same at forced sale for the payment of the said alleged taxes; that said *business probably has a value far in excess of the value of the physical properties* thereof, as a going concern with *good will*, and that if the defendants were allowed to take possession and seize said business and sell and dispose of the same, *plaintiff's business would probably be completely destroyed*, and plaintiff would thereby *suffer great and irreparable* damage and injury which *could not be compensated by any provision of law* or by the final allowance to him of the refunds to which he is probably entitled."

IV.

SPECIFICATION OF ERROR

The Circuit Court of Appeals for the Tenth Circuit erred in holding that the findings of the District Court to the effect that the petitioner taxpayer did not have funds sufficient to and was not able to pay an alleged deficiency assessment of income taxes which was probably erroneous and excessive and for the same years for which the taxpayer had already probably overpaid and was entitled to a refund, without a liquidation of his business having a value far in excess of the value of the physical properties thereof as a going concern with good will, and that the threatened seizure and sale thereof to satisfy such alleged deficiency assessments would probably completely destroy the taxpayer's business and result in irreparable damage and injury to him for which he could not be compensated by any provision of law, did not present such unusual,

exceptional and extraordinary circumstances as to justify and give jurisdiction to the interposition of equity to enjoin the collection of such alleged additional taxes in a suit brought for a refund of the taxes alleged to have been overpaid.

V.

SUMMARY OF ARGUMENT

The decision of the Circuit Court of Appeals for the Tenth Circuit in this case is in conflict with the decisions of this Court and of the Circuit Court of Appeals for the Sixth Circuit, in that it holds that the findings of fact as outlined in the foregoing Specification of Error did not justify or give jurisdiction to the District Court to grant a temporary injunction as an exception to the provisions of Section 3653 of the Internal Revenue Code, 26 U.S.C.A.

VI.

ARGUMENT

The Circuit Court of Appeals, in its opinion, says (R. 62):

> "Section 3653 of the Internal Revenue Code, 26 U.S.C., Sec. 3653, provides that, except as provided in Section 272(a), 871(a), and 1012(a), no suit to restrain the assessment or collection of any tax shall be maintained in any court. The statute is broad in sweep; and a complaint, *as here*, alleging that all taxes due have been paid, that the deficiency assessment is *erroneous, arbitrary, and illegal*, that the taxpayer is unable to pay the additional assessment, and that the

threatened *sale of the business will subject the taxpayer to irreparable injury* for which he has no plain, speedy and adequate remedy at law, *without more*, fails to state a cause of action which warrants the issuance of an injunction restraining the collector from enforcing payment of the tax. (Citing cases.)

"The statute does not withhold from a court of equity jurisdiction in a case where the complainant shows that in addition to the illegality of the tax, *special and extraordinary circumstances are present* sufficient to bring the case within some acknowledged head of equity jurisprudence. *Miller* v. *Nut Margarine Co.*, 284 U.S. 498; *Allen* v. *Regents*, 304 U.S. 439; *Burke* v. *Mingori*, *supra*. *But no such circumstances are presented here.*

"* * This taxpayer, * * *without the presence of any extraordinary circumstances taking the case beyond the reach of Section 3653, supra,* * * sought injunctive relief on general principles of equity. Such an action cannot be maintained. * *"

The court makes no explanation of what it means by the expression, "without more," or by the expression, "special and extraordinary circumstances." It *does* recognize by the opinion that there is an *exception* to the prohibition made by Section 3653, and contents itself by saying that "No such circumstances are presented here."

The decision, however, is not alone erroneous because of a misinterpretation of the *facts* presented in this case, but it is equally erroneous in its interpretation of the *law* as laid down by this Court and by other Federal courts *as to what facts are necessary to be shown* in order to bring the case within the exception recognized.

The leading authority is the case of *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 76 L.ed. 422, wherein Justice Pierce Butler in the seventh syllabus announced the rule to be:

> "Notwithstanding the Federal statute (Rev. Stat. 3224, U.S.C., Title 26, Section 154) declaring that no suit for the purpose of restraining the collection of any tax shall be maintained in any court, a suit may be maintained to enjoin collection where complainant shows that in addition to the illegality of the exaction there exist *special and extraordinary circumstances* sufficient to bring the case within some acknowledged head of equity jurisprudence."

And, in the body of the opinion, said:

> "Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. at L. 475, Chap. 169) which became Rev. Stat. 3224, U.S.C., Title 26, Sec. 154, this Court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the *sole* ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. *And this Court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. Dows* v. *Chicago*, 11 Wall. 108, 20 L.ed. 65; *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L.ed. 231; *State R. Tax Cases*, 92 U.S. 575, 614, 23 L.ed. 669, 673.

Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests; *Cumberland Teleph. & Teleg. Co.* v. *Kelly*, 87 C.C.A. 268, 160 Fed. 316, 321, 15 Ann. Cas. 1210; *Baker* v. *Baker*, 13 Cal. 87, 95; *Bradley* v. *People*, 8 Colo. 599, 604, 9 Pac. 783; 2 Lewis's Sutherland, Stat. Constr., 2d Ed., Sec. 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This Court has given effect to Section 3224 in a number of cases; *Snyder* v. *Marks*, 109 U.S. 189, 191, 27 L.ed. 901, 902, 3 Sup. Ct. 157; *Dodge* v. *Osborn*, 240 U.S. 118, 121, 60 L.ed. 557, 559, 36 Sup. Ct. 275; *Dodge* v. *Brady*, 240 U.S. 122, 60 L.ed. 560, 36 Sup. Ct. 277. *It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable; Hill* v. *Wallace*, 259 U.S. 44, 62, 66 L.ed. 822, 827, 42 Sup. Ct. 453; *Dodge* v. *Osborne*, *supra* (240 U.S. 121, 60 L.ed. 559, 36 Sup. Ct. 275); *Dodge* v. *Brady*, 240 U.S. 122, 60 L.ed. 560, 36 Sup. Ct. 277, *supra*. Cf. *Graham* v. *DuPont*, 262 U.S. 234, 257, 67 L.ed. 965, 968, 43 Sup. Ct. 567; *Brushabker* v. *Union P. R. Co.*, 240 U.S. 1, 60 L.ed. 493, L.R.A. 1917-D 414, 36 Sup. Ct. 236, Ann. Cas. 1917-B 713."

More recently, the Circuit Court of Appeals for the Sixth Circuit decided the same matter, in the case of *John M. Hirst & Co.* v. *Gentsch*, 133 Fed.(2d) 247, wherein that court said:

"The single question presented upon the appeal relates to the jurisdiction of the court to restrain collection of taxes assessed against the appellant * *. The

> District Court dismissed the bill on the ground that it lacked jurisdiction in view of Section 3653 of Title 26, U.S.C.A., Int. Rev. Code, and also upon the ground that the complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for."

The Government in the case at bar took the same position, and the decision of the Circuit Court is grounded upon the same proposition, "That the facts alleged and the findings made by the District Court state no cause of action to warrant injunction." The allegations in the *Hirst case, supra*, are stated in the opinion:

> "* * It is asserted that the partnership is not subject to such taxes, nor to the penalties which have been added thereto; that the partnership is *unable to pay such taxes*, penalties and interest, *without liquidation of its property*, and that if the Collector, whose duty it is to collect them, proceeds to do so by distraint or levy, the plaintiff *will be forced into complete cessation* of its mining operations *and its business will be ruined*. It alleges, therefore, that it has *no adequate remedy at law*."

Every fact there alleged is alleged in the complaint in this case and found by the District Court to be probably true; and even more: Here petitioner alleged that he had, and the District Court found that he probably had, overpaid his taxes and was entitled to a refund which he sought to recover; he further alleged, and the District Court found it to be probably true, that his properties had an intangible value far in excess of their tangible value; and that a seizure and forced sale of the physical properties not only would "result in a complete cessation of his operations and ruin

his business," but also would "destroy its intangible value and its good will" for which petitioner "could not be compensated by any provision of law or by the final allowance to him of the refunds to which he is probably entitled."

And yet the court held in the *Hirst case, supra,* that:

"The complaint below having been dismissed upon motion, its allegations must be taken as true, and so considered they show that the taxes sought to be collected from the appellant are probably not validly assessed taxes, and if collection is enforced by distraint the appellant *will be ruined in its business and forced to close its mine.* In that event *no remedy* provided by the Internal Revenue Law *would be adequate to compensate the appellant for its loss.* There is thus *presented a case under the authorities, as we read them, for the interposition of a court of equity,* and the exercise of its extraordinary equity power.

"The District Judge, recognizing, in support of the appellant's petition, the force of the decision of *Miller* v. *Standard Nut Margarine Co., supra,* entertained doubt that it may now be followed or applied with judicial assurance, in view of the trend of decision exemplified by *Toucey* v. *New York Life Ins. Co.,* 314 U.S. 118, 62 Sup. Ct. 139, 86 L.ed. 100, 137 A.L.R. 967, and *Southern Ry. Co.* v. *Painter,* 314 U.S. 155, 62 Sup. Ct. 154, 86 L.ed. 116. While the *Toucey* and *Painter cases* do not deal with Section 3653, and are concerned with injunctions to restrain proceedings in State courts, the doubt so expressed poses for us once more a problem recently met in a number of cases. In a time of evolutionary development in constitutional and statutory interpretation, we are urged to base decisions upon a foreshadowing of adjudications to come rather than upon clearly applicable precedents. Whatever course others may take, we are content to adhere to the observation made by us in *Ammond* v. *Pennsylvania R. R. Co.* (6th

Cir.), 125 Fed.(2d) 747, 751, to which we may add that, until the contrary is demonstrated, we find the rule of *stare decisis* a safer guide to decision than a reading of the stars.

"Judgment reversed and the cause remanded for consideration of the petition."

The same case also suggests that the extraordinary or exceptional circumstances justifying a court of equity to intervene have not been catalogued, but that in *Miller* v. *Standard Nut Margarine Co., supra,* the fact that the collection of a tax would prove to be arbitrary and oppressive, destroy the business of the taxpayer, ruin it financially, and inflict loss for which it would have no remedy at law, was held to indicate circumstances so extraordinary and exceptional as to give judicial sanction for the interposition of equity.

This follows the holding of the same court in *Midwest Haulers* v. *Brady,* 128 Fed.(2d) 496, the third syllabus of which reads:

"Where rights and property of an alleged taxpayer *will be utterly destroyed* if he is compelled to pay a tax that is not in fact his obligation, and the pursuit of *remedy by suit for recovery will not adequately restore him to that which he has lost, a court of equity will take jurisdiction to grant relief in advance of payment* notwithstanding statute prohibiting injunction restraining collection of tax. 26 U.S.C.A., Int. Rev. Code, Section 3653."

And in the body of the opinion in that case, at Page 499, the court said:

"* * The complaint in the case at bar, the allegations of which are admitted by the motion to dismiss,

alleges facts which if true, show that the *taxes sought to be collected* by the appellee from appellant *probably are not in fact due* and the allegations further show that appellant's principal assets are *intangibles* composed of contracts with the owners of carrier's equipment and Universal and certificates of convenience and necessity for the use of the public highways of the states in which appellant is authorized to conduct its business. The allegations further show that *these assets could not be sold at forced sale at any price and that a sale of the other assets of appellant will incidentally destroy its intangibles.* It thus appears that the collection of the taxes alleged to be due by distraint and sale would *destroy property* of appellant, *the value of which it could in no way recover through processes provided* under the Internal Revenue Law."

Another well considered opinion is from the District Court of the Northern District of Ohio (within the Sixth Circuit), in *National Exchange Club* v. *Reams*, 4 F.R.D. 151. The Government in that case filed a motion to dismiss upon the ground that the court was without jurisdiction, the complaint alleging that the plaintiff was *without funds with which to pay* said alleged taxes, interest and penalties, *and that the seizure of its property and assets would utterly destroy its business*, and it sought the aid of the equity court to restrain the Collector and have a determination of all matters made. In the body of the opinion the court states that the *primary* question involved is "whether the plaintiff *is or is not liable* for the taxes in question," and says:

"The court, under the provisions of Rule 42 of the Rules of Civil Procedure, may try the issue of the legality or illegality of the tax collected and sought

to be collected, and that is the ultimate point that both the plaintiff and the defendants are interested in having determined. In this connection, we are then in much the same situation as that which confronts the court in the case of *Midwest Haulers, Inc.* v. *Brady, supra,* wherein the plaintiff has pending, not a petition containing two separate causes of action, but two separate cases in this court—one in which he seeks to restrain the Collector, and another in which he seeks to recover from the United States of America for taxes paid. Very recently, at pre-trial conference, counsel for both sides stipulated that the suit to recover for taxes paid might be submitted to the court at the coming April assignment of non-jury cases for trial, and that the *ultimate question* of legality or illegality of the taxes involved *may be determined and be applicable to the other suit in which a restraint is sought.*"

The contentions made here are clearly expressed and the views stated sustaining our position, in Mertens' Law of Federal Income Taxation, Volume 9, Section 49.172, Page 150 *et seq.*, wherein it is said:

"* * *In cases of extraordinary and exceptional hardship injunctive relief will be granted.* The United States Supreme Court has accordingly held that the unusual system attendant on requiring collection and payment of taxes on admissions to athletic events conducted by a state university system, was sufficient to vest jurisdiction in a court of equity notwithstanding the provisions of Section 3224 of the Revised Statutes, and that the application for injunction was proper under the circumstances (citing *Allen* v. *Regents,* 304 U.S. 439, 82 L.ed. 1448, 58 S. Ct. 980). * * An injunction has been granted against the sale of a farm under a warrant of distraint, where the taxpayer was a poor widow with minor children, who had no adequate remedy at law, having no money

with which to pay the tax and then sue to recover (citing *Leonardi* v. *Goldberg et al.*, P-H 1940 Tax Service, Par. 62,520 [U.S.D.C., N.J., 1940] following *Driscoll* v. *Jones*, 19 Fed. Supp. 792). In another instance a distraint upon salary has been enjoined where it resulted in an interference with the taxpayer's earning of a livelihood (citing *Neidich* v. *Maloney et al.*, P-H 1940 Tax Service, Par. 62,497 [U.S.D.C., N.J., 1940])."

And among the cases cited in the notes to the foregoing text in Mertens' is *Regents of the University System of Georgia* v. *Page* (C.C.A. 5th, 1936), 81 Fed.(2d) 577, wherein the court enjoined the collection of admission taxes on the ground that the University had no adequate remedy at law for recovery, and in the opinion stated that:

"* * The enactment of the Act of March 2, 1867, 14 Stat. 475, which became R. S., Sec. 3224, was *merely declaratory of the prior rule* that courts of equity will not restrain the collection of a tax upon the *sole* ground of its illegality. *The rule is not absolute, and is inapplicable in extraordinary and exceptional circumstances.* The absence of a plain, adequate, and *complete* remedy at law to pay the illegal tax and sue to recover it raises an independent ground to support injunctive relief. *Such ancient equitable jurisdiction was not abrogated by the above statute* which is construed in harmony with the former equitable doctrine" (citing the *Miller case, supra*).

The foregoing cases from this Court and from the Sixth Circuit cannot be distinguished on the facts from the present case, and it necessarily follows that the decision of the Circuit Court of Appeals in this case wherein it holds that the facts alleged and shown are not sufficient to authorize and give jurisdiction to the District Court

to grant the injunctive relief prayed for, is in direct conflict with the cited cases; and that such a situation presents a case which should appeal to the discretion of this Court not only in order to harmonize the decisions of the various Circuit Courts but also to harmonize them with the ultimate guiding rule announced by this Court.

As shown by the record and the opinion of the Circuit Court, the appeal was *only* from the order granting a temporary injunction restraining the collection of the taxes. And while the Circuit Court does not indicate that that part of the suit asking for the recovery of the amount of taxes alleged to have been already overpaid is not properly brought; yet it does seem to base its decision partly upon the premise that petitioner did not pursue the proper remedy, saying in the opinion (R. 63):

> "Two separate remedies are available to a taxpayer when a deficiency assessment is made against him which he challenges. One is to pay the tax, file a claim for refund, and on rejection of the claim sue at law for recovery. * * But this taxpayer did not avail himself of *either* remedy. * *"

It is submitted, however, that petitioner *did* avail himself of one of these remedies; while he did not pay *all* of the tax *claimed*, he paid *more than* he says *was due*, filed claims for refund of the alleged *overpayment*, and upon such claims being disallowed, brought this suit for recovery of the *excess*.

In *Coates* v. *United States*, 111 Fed.(2d) 609, the Circuit Court of Appeals for the Second Circuit said:

"The defendant urges that the district court did not have jurisdiction of the suit because the plaintiff, it is said, had not paid the *entire* tax for 1932 when he brought suit. The point did not impress the district judge and does not impress us. The contention that only a part of the 1932 tax had been paid when the action was brought involves the merits, not the jurisdiction. *If the plaintiff's view* as to the compensation received from the villages *was sound, he had paid the entire tax and more* when he started his action."

And, in *Sirian Lamp Co.* v. *Manning*, 123 Fed. (2d) 776, the Circuit Court of Appeals for the Third Circuit held:

"Payment in full of deficiency income tax assessment was not a 'condition precedent' to maintenance of taxpayer's suit against collector of internal revenue to recover a partial payment on the deficiency assessment, and *to litigate validity of the assessment."*

And saying, further:

"The appropriate action at common law was in *assumpsit*, for money had and received. The theory upon which recovery was allowed was that the retention of the moneys received would result in the unjust enrichment of the defendant. *Stone* v. *White*, 301 U.S. 532, 534, 57 S. Ct. 851, 81 L.ed. 1265. If a tax assessment is erroneous, unjust enrichment results whether the defendant has received moneys sufficient to pay the *entire* tax assessed or only a *portion* of it. *The important factor* is that the retention of the money would be unjust because there was *no tax legally due."*

Where a court takes or assumes jurisdiction in any case for any purpose, it acquires and has jurisdiction for all purposes and it becomes the court's duty to dispose

of any and all matters involved in the case presented. That such is true is supported by numerous authorities. They are so numerous that it is difficult to decide which one should be submitted.

In the case of *Hartford Accident and Indemnity Co.* v. *Southern Pacific Railway Co.*, 273 U.S. 207, 71 L.ed. 612, affirming a case in 3 Fed.(2d) 923, the Court said:

> "'A court of equity on obtaining jurisdiction over some portions of a controversy, may decide the whole issue and award complete relief."

Another of the many cases sustaining this same view is *Doherty* v. *McCauliffe*, 74 Fed.(2d) 800 (*certiorari* denied, 294 U.S. 730, 79 L.ed. 1260).

In a very recent case which arose in Oklahoma and was decided by the Circuit Court of Appeals in 1930, that of *Barnett* v. *Mays*, 43 Fed.(2d) 521, the court said:

> "Court having acquired jurisdiction to settle part of single controversy presented for determination, has power and authority to determine entire controversy."

The finding of the trial court shows this tax to be erroneous and therefore illegal. In the case of *Nevada-California Power Co.* v. *Hamilton*, 235 Fed. 317, Syllabus 8 of the court said:

> "Where taxing officials assess in a manner which they must know will produce inequities and unjust assessments, their acts are to be treated as *arbitrary or fraudulent.*"

That is the exact situation presented here—an arbitrary assessment which makes the assessment illegal; and

we insist that where the tax is illegal and a taxpayer is unable to pay the same and seek a refund without destroying his business, including its good will, for which the law allows no relief, a case is presented of exceptional circumstances justifying the interposition of equity.

It is evident that in this case there is no adequate remedy at law, and where this exists equity will intervene, as was held in the case of *Dodge* v. *Brady*, 240 U.S. 122, 60 L.ed. 560, 36 Sup. Ct. 277.

Justice Taft in *Hill* v. *Wallace*, 259 U.S. 44, 66 L.ed. 822, 42 Sup. Ct. 453, said that injunction will issue where the proposed erroneous or illegal tax and its collection "will seriously injure the value of the Board of Trade to its members * *."

It has been said that a court of equity will intervene in those cases where there is some *peculiar or intrinsic value of property to the owner which cannot be compensated for in money; Odlin* v. *Woodruff*, 31 Fla. 160. The trial court here found "that said business probably has a value far in excess of the value of the physical properties thereof, as a going concern with good will."

We cannot refrain from here saying to this Court that this business is of a peculiar value to this petitioner as well as to the community for the reason that there is no other concern in Oklahoma capable of, and it is a rare thing to find a man as competent as he, to handle and repair this big machinery weighing sometimes thirty or forty tons,

and that his services in this respect were invaluable to the community and to the country in the war just past.

The courts have uniformly held, and it is the rule which should be universally applied that "one of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion and to give the necessary relief to their corrections," and this certainly applies to the present case.

CONCLUSION

In conclusion, your petitioner respectfully submits that the final determination by this Court of the questions of law and of equity involved in this case is of the utmost importance and magnitude in order to prevent irreparable injury to petitioner and to innumerable other persons who may from time to time be placed in a similar position; and that the decision of the Circuit Court of Appeals herein is not only contrary to law and to the rules and principles of equity, but is contrary to the earlier decisions announced by this Court and by other Circuits Courts, thereby calling for the exercise by this Court of its supervisory powers in order that the errors herein pointed out may be corrected, that the law may be properly and authoritatively defined, and that the judgment of the Circuit Court of Appeals shall be reversed in order that justice may be done to petitioner, and that to such an end a writ of *certiorari* should be granted and this Court should review the decision of the

Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

Respectfully submitted,

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